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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 777.

EASTERN AIR LINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

REPLY OF EASTERN AIR LINES, INC. TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI.

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INDEX.

	PAGE
Introduction	1
I. Reply To The Arguments Raised Respecting The "*Ashbacker*" Doctrine	3
A. Reply To The Contention That The Decision Below Rests Upon The Question Of Notice	3
B. Reply To The Contention That The Decision Of The Court Below Is Not In Conflict Internally As Between The TWA Award And The Delta Award	5
C. Reply To The Argument That There Is No Conflict Between Circuits	7
II. Reply To Answers Regarding Elements Of Public Convenience and Necessity	11
III. Reply To Answers Regarding The Press Release Procedure	14
IV. Reply To Miscellaneous Matters	15
Conclusion	18

Table Of Authorities.

Cases.

	PAGE
Ashbacker Radio Corp. v. *Federal Communications Commission*, 326 U. S. 327 (1945)	17
Clarke v. *United States*, 101 F. Supp. 587 (D. D. C. 1951)	11, 12
Eastern Air Lines, Inc. v. *Civil Aeronautics Board*, 243 F. 2d 607 (D. C. Cir. 1956)	10, 11
Eastern Air Lines, Inc. v. *Civil Aeronautics Board*, 271 F. 2d 752 (D. C. Cir. 1959)	7, 8
Great Lakes-Southeast Service Case, CAB Docket 2396 *et al.*, CAB Order E-9734 (Nov. 10, 1955)	9
National Labor Relations Board v. *Pittsburgh Steamship Co.*, 340 U. S. 453 (1951)	15
St. Louis-Southeast Service Case, CAB Docket 7735 *et al.*, CAB Order E-10304 (May 18, 1956)	9
St. Louis-Southeast Service Case, CAB Docket 7735 *et al.*, CAB Order E-11888 (Oct. 18, 1957)	8, 9
Seven States Area Investigation, CAB Docket 7454 *et al.*, CAB Order E-13254 (Dec. 8, 1958)	14, 15
Southeastern Area Local Service Case, CAB Docket 7038 *et al.*, CAB Order E-14754 (Dec. 18, 1959)	16
United Air Lines, Inc. v. *Civil Aeronautics Board*, No. 15414 D. C. Cir. 1960	16

Miscellaneous.

Congressional Record 6872 (Apr. 6, 1960)	17
Letter from Chairman Durfee of the Civil Aeronautics Board to Richard M. Nixon, President of the Senate (Mar. 25, 1960)	17
Official Airline Guide, April 1960	5

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Introduction.

Eastern Air Lines, Inc. ("Eastern"), petitioner herein, hereby replies, under Rule 24 (4), to the briefs filed by American Airlines, Inc. ("American"), Delta Air Lines, Inc. ("Delta"), and National Airlines, Inc. ("National") in opposition to Eastern's petition for certiorari and, as well, to the Memorandum for the Civil Aeronautics Board ("the Board" or "CAB") in this case which, significantly, does not oppose certiorari.[1] Eastern does not submit a

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[1] Reference to particular portions of those documents filed by those parties will be by abbreviation of their respective names, followed by the page number of the brief (or "memorandum" in the case of the CAB) as, for example, (AAL 1), (DAL 2), (NAL 3), (CAB 4). Reference to Eastern's petition for certiorari will be in similar form as, for example, (EAL 5). References to portions of the Joint Appendix below, certified to this Court, will be comparable, as, for example, (J. A. 6).

detailed, point-by-point rebuttal to the errors in the various documents of other parties, but will confine this reply to a treatment of the principal points (as distinguished from the subsidiary contentions) of the other parties.[1]

The parties devoted the bulk of their answers to the "*Ashbacker*" problem and made, in general, three principal allegations: (1) the decision below rested on the question of "notice" to the parties of the issues in the proceeding before the Board; (2) there is no internal conflict within the decision of the Court below as between its treatment of the Delta and TWA awards; and (3) there is no conflict between circuits on the "*Ashbacker*" issue.

In addition, American asserts (AAL 18-20) that there is another unchallenged ground on which the decision below rests, namely, that there were no proper findings of public convenience and necessity for duplication of existing licenses for southern transcontinental service. Eastern will reply, not because it opposes American's contention,

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[1] It will be recognized that Eastern finds itself in something of an anomalous position with respect to American and National. Eastern concurs in the result reached by the Court below in overturning the award to Trans World Airlines, Inc. ("TWA") and, if certiorari is granted by this Court, will join American and National in asserting the invalidity of the Board's award to TWA. American's and National's opposition is basically to TWA's petition for certiorari in No. 679, of course, but naturally those parties have attacked Eastern's position as a necessary byproduct of their opposition to TWA, since it is expected that if the Court grants certiorari in No. 777 (Eastern's petition), it will necessarily grant certiorari in No. 679 (TWA's petition), and, understandably, American and National do not desire the latter result. Delta stands in the same posture as regards the decision by the Court below on the TWA award (that is, Delta agrees with Eastern, American and National that the Court below reached the proper result on that portion of the case). However, Eastern and Delta are in direct conflict with respect to the decision of the Court below on the award made by the Board to Delta. Eastern contends that that award was invalid, while Delta naturally wishes to support the validity of the award by the Board and to avoid review by this Court of the decision of the Court below sustaining that award.

but because the point raised by American reflects internal inconsistencies within the decision below.

American does not discuss Eastern's assertions that the Board did not make lawfully required findings on public convenience and necessity and that the decision was prejudiced by a "press release" announcing the Board's predeterminations (see AAL 21, n. 32), nor does National discuss those points. Delta alludes to the errors alleged by Eastern with respect to the elements of public convenience and necessity and the Board's press release prejudgment (DAL 23-25). National cites authority for the proposition that certiorari is granted only in cases involving principles the settlement of which is of importance to the public, and in cases where there is a real and embarrassing conflict of opinion and authority between the Courts of Appeal (NAL 8-10). The Board addresses itself briefly to Eastern's contentions respecting the elements of public convenience and necessity (CAB 11-14) and to Eastern's assertion that the "press release procedure" constitutes error (CAB 14-15).

Eastern briefly replies to the contentions of the parties respecting the "*Ashbacker*" question and to the arguments regarding Eastern's other allegations of error, as follows:

I.

Reply to the arguments raised respecting the "*Ashbacker*" doctrine.

A. Reply to the Contention that the Decision Below Rests upon the Question of Notice.

The argument is made that the ruling of the Court below rests upon an unlawful failure to give the parties adequate notice of the issues in the case.[1] That is to say, it is argued

[1] This appears to be the position of American (AAL 3-4, 16) and of Delta (DAL 3, 6, 7-8, 11-13, 21-22); but *not* of National, which says (correctly, Eastern submits) that the Court ruled that the Board's findings in the proceeding before it established *prima*

that the Court ruled the Board limited the case strictly to an "area" proceeding (the area being between St. Louis and the Southeast) and did not give the parties "notice" that a transcontinental award might result and thus denied a fair hearing to the parties. Accordingly, the decision is not so much an *"Ashbacker"* decision *qua "Ashbacker"*, but is rather a *"notice"* problem. However, none of the parties discussed the proposition that if this be true as to TWA[1] and the West Coast, the *same* must be true as to Delta[2] and Kansas City—in other words, if the Board strictly limited the proceeding to St. Louis-Southeast service, giving no notice that more expanded authority than that could result and accordingly the Board could not lawfully grant TWA a transcontinental route, then surely it was equally unlawful for the Board to grant Delta a Kansas City-Atlanta/Birmingham route in view of the strict limitations of the issues (*no* issues of service *west* of St. Louis or Memphis) and the lack of notice that such expanded authority could result from the proceeding. (It is pertinent, too, that Kansas City lies on TWA's route west of St. Louis and on Delta's route northwest of Memphis, but the through Kansas City-Southeast service award to TWA was

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facie mutual exclusivity (despite the Board's disclaimer of such exclusivity) and, therefore, the decision must be remanded to the Board for appropriate corrective action by it (NAL 4-5, 7). The Board cogently observes that the basis of the Court's decision is unclear (CAB 1) and that while there is some indication that the Court may have decided the case on the question of "notice," such an interpretation is inconsistent with the Court's specific ruling that Eastern had "notice" of mutual exclusivity (CAB 8).

[1] It will be recalled that TWA was awarded a West Coast-Atlanta/Florida route via one stop at St. Louis and the Court below ruled this award was invalid.

[2] Delta was granted a Kansas City-Atlanta/Birmingham route via one stop at Memphis and the Court below ruled that this award was valid. Kansas City was excluded from the area of the case (*e.g.*, J. A. 94) as was the West Coast (J. A. 92-94).

found invalid and the same award to Delta was, inconsistently, found valid.) Eastern submits that a consistent application of the law requires a consistent result on the same facts, *mutatis mutandis*. The failure of the Court below to apply its reasoning (if its reasoning be that of "notice") consistently to the TWA and Delta awards illustrates the confusion in the law of "*Ashbacker*".

B. Reply to the Contention that the Decision of the Court Below is not in Conflict Internally as Between the TWA Award and the Delta Award.

The contention of the parties opposing certiorari at this point appears to be, in essence, that TWA received an "effective" transcontinental award, which was unlawful since the proceeding was strictly limited to a St. Louis-Southeast proceeding and there was no notice that more expanded authority could result. But, by contrast, it is argued the Delta award was so restricted that Delta could not offer an "effective" Kansas City-*Florida* service.[1] This alleged distinction, by confusing the point urged by Eastern with respect to the Delta award, simply glosses over the fact that the approach by the Court below to the Delta award directly contradicts its disposition of the TWA award. No party has denied that Delta was awarded an effective Kansas City-*Birmingham/Atlanta* route, via one stop at Memphis.[2] That is precisely what Eastern is

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[1] This is the interpretation of American (AAL 8-9) and National (NAL 12-13), but seemingly not of Delta, whose position is not at all clear, but seems to correspond to that of the Board as set out below. See (DAL 20-21).

[2] Delta presently offers through-plane service between Atlanta and Birmingham on the one hand, and Kansas City on the other via Memphis (*Official Airline Guide*, April 1960). (*Cf.* AAL 9, nn. 7, 8; provision of through-plane service shows effective route, while lack of through-plane service shows lack of effective route).

complaining about: the Board granted Delta an effective Kansas City-*Atlanta/Birmingham* route without affording Eastern any hearing on its application to provide *exactly* the same services that were possible to Delta, subject to precisely the same restriction imposed on Delta. The Delta award is in exactly the same posture as the TWA award: if it was wrong for the Board to grant TWA an effective Atlanta-Kansas City and San Francisco route, by way of one stop at St. Louis, without granting comparative hearings to competing applicants, surely it was equally wrong to grant Delta an effective Atlanta-Kansas City route via one stop at Memphis.

The Board does not rely on the alleged distinction between "effective" and "ineffective" awards, rather it says that there were several possible routings inherent in the Eastern application and there is nothing wrong with infringing Eastern's right to a hearing on some of several possible routings since there might be a prospect for obtaining *another* routing in another proceeding by virtue of that application (CAB 10-11).[1]

There appear to be two defects in that position.

First, application of the Board's view could completely dissipate the effectiveness of the *"Ashbacker"* doctrine. By holding a series of hearings limited to only *one* or *two* of several possible routings inherent in the Eastern application, and each time denying Eastern comparative consideration on the ground that *the totality* of Eastern's application was not concerned with the proceeding, the Board could, bit by bit, grant authority (sought by Eastern) to other carriers without ever giving Eastern *any* hearing on *any part* of its application. Put another way, the Board

[1] Delta's interpretation appears to be somewhat similar, see above at 5, note 1.

could give the entire pie, piece by piece, to other parties until all of it was given away without allowing Eastern to have a chance at the whole pie or at any part of it. We do not believe the Supreme Court, or any of the lower tribunals would condone such a device to deprive Eastern of its right to its day in Court.

Secondly, the Board's assertion that it is not required to consider the various "portions" of Eastern's application, is diametrically opposed to what the Court below said with regard to the route awarded TWA. The Court noted (at B16-B20, and especially at B18-B20)[1] that there were several route possibilities inherent in Eastern's St. Louis-West Coast application. *But* the Court held that the Board must consider *each* of the various possibilities and consider whether TWA's West Coast-St. Louis-Florida segment would prevent a grant of Eastern's Florida-St. Louis-West Coast application. That is precisely what Eastern believes the Court should have stated logically and consistently with respect to the Delta award, namely, grant of Kansas City-Atlanta/Birmingham authority to Delta would preclude grant of Eastern's Kansas City-Atlanta/Birmingham application.

Viewed from any aspect,[2] the Court's ruling on the Delta award is inconsistent with its ruling on the TWA award.

C. Reply to the Argument that There is no Conflict Between Circuits.

The three airline parties' contention that there is no conflict between the decision of the Court below and the decision of the Second Circuit Court of Appeals in *Eastern*

[1] References to the decision of the Court below are to the printing of that decision attached to Eastern's Petition as Appendix B.

[2] Including the "notice" perspective, see 3-5, above.

Air Lines, Inc. v. *Civil Aeronautics Board*, 271 F. 2d 752 (2d Cir. 1959), appears to rest upon an erroneous and misleading statement of the facts. Briefly stated, American, Delta and National assert that the Court below ruled that Eastern had made a *prima facie* showing of mutual exclusivity in the *St. Louis Case* and, therefore, should receive appropriate protective action from the Board, but they contend that the Second Circuit held Eastern had not presented evidence in support of its claim of mutual exclusivity in the *Great Lakes Case* and, therefore, the Board was not required to make findings on the issue.[1] American and Delta even pointed out that the Court below had before it the decision of the Second Circuit and, therefore, the Court below saw no conflict.[2] That contention is materially misleading.[3] Exactly the same factual situations appeared in the two proceedings before the Board and Eastern made exactly the same showing of (and the same requests for appropriate findings on) mutual exclusivity in both cases, *mutatis mutandis*.[4] This matter is set out at page 23 of

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[1] (AAL 17 n. 22), (DAL 18-19), (NAL 11).

[2] (AAL 17-18); (DAL 19).

[3] By contrast, the Board tacitly concedes that to all intents and purposes there *is* a conflict between the two decisions, but that if the decision below "rests on the notice point" (*cf.* Part I.A. above, and especially page 3, note 1) there is no "necessary" conflict (CAB 9-10). Candidly, Eastern does not understand the Board's attempted reconciliation of the cases, nor its explanation how "the problem can be resolved" (CAB 10).

[4] Delta suggests (DAL 18-19) that the *Great Lakes Case* and the *St. Louis Case* were dissimilar proceedings before the Board. This appears to be the first time that Delta has suggested that the cases are not identical in principle for all practical purposes. Delta errs. The *Great Lakes Case* was an area case considering issues of service between points in the Midwest and points in the Southeast, while the *St. Louis Case* was an area case considering service between St. Louis and the Southeast. Both were typical "area" proceedings.

The Board's order deferring decision in the *St. Louis Case* for contemporaneous decision with the *Great Lakes Case* (J. A. 409-11)

Eastern's petition herein and pages 21-22 of Eastern's petition for certiorari in No. 785, and need not be repeated. However, Eastern respectfully requests that this Court compare Eastern's petition for reconsideration presented to the Board in the *St. Louis Case* (appearing at J. A. 618-19 in this case) with Eastern's petition for reconsideration presented to the Board in the *Great Lakes Case*

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is replete with observations as to the similarity of the cases, and to the "close relationship exist[ing] between the two proceedings" (J. A. 410) and demonstrates that the Board considered them to be on the same footing, as did, Eastern submits, all parties (including Delta) to the proceedings before the Board. Particularly are they identical with respect to the "beyond-area" mutual exclusivity problems. An illustration of that similarity is found in the first consolidation order issued by the Board in the *St. Louis Case* (J. A. 89-99) where the Board stated, with respect to the situation posed by applications contemplating service beyond the area of the case:

> "The situation here presented by the beyond terminal aspects with respect to St. Louis is similar to that which was presented in the *New York-Chicago Case*, Docket No. 986 *et al.*, decided November 14, 1955, and the *Great Lakes-Southeast Service Case*, Docket No. 2396 *et al.*, Order No. E-9734, wherein the Board adopted a mandatory stop requirement as an appropriate limitation" (J.A. 93).

Nothing could be more apparent than that the Board considered the *St. Louis* and *Great Lakes Cases* as parallel, and, indeed, companion proceedings. The material just quoted followed a discussion as to the scope of the proceeding and the Board manifestly thought that the *St. Louis Case* should stand in the same posture as the *Great Lakes Case*. The situation presented by Eastern's excluded applications is the same in each case, *mutatis mutandis*. In the *Great Lakes Case*, Northwest was awarded a West Coast-Atlanta/Florida route via one stop at Chicago—authority sought by Eastern in an application that was not included in the proceeding. In the *St. Louis Case*, TWA was awarded a West Coast-Atlanta/Florida route via one stop at St. Louis—authority sought by Eastern in an application that was not included in the proceeding. Precisely the same sort of facts were adduced in both proceedings before the Board, and identical errors were charged on appeal to the respective Courts of Appeal. However, the Court below reversed the TWA award, while the Second Circuit upheld the Northwest award. Delta's allegation that there is a difference between the two proceedings is plainly erroneous; the facts are the same but the conclusions reached by the reviewing Courts are different.

(appearing at pp. 1438a-39a in the joint appendix before the Second Circuit, certified to this Court in No. 785). Eastern made exactly the same showing in both cases but the two Circuits went in diametrically opposite directions. The Court of Appeals for the District of Columbia had the opinion of the Second Circuit in its records, to be sure, but it did not have the Joint Appendix of that Court before it, and could not know that the Second Circuit did not give Eastern's petition for reconsideration in the *Great Lakes Case* the same importance ascribed by the Court below to Eastern's identical petition for reconsideration in the *St. Louis Case* when it held that Eastern, in its petition for reconsideration in *St. Louis,* showed facts establishing *prima facie* mutual exclusivity (B19-B20). While the failure of the Court below expressly to recognize the conflict of its decision with that of the Second Circuit is understandable and excusable, the efforts of American, Delta and National to perpetuate that error are an unjustified imposition both upon Eastern and upon this Court.

Passing from the conflict between the District of Columbia Circuit and the Second Circuit, no party has reconciled the decision of the Court below with the opinion of the same Court in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* 243 F. 2d 607 (D. C. Cir. 1956), where the Court of Appeals said, in dicta, that *"Ashbacker"* would *not* apply to the expansion of a limited case to a transcontinental proceeding, while in the opinion below it held that *"Ashbacker" would* apply when a limited area case was expanded into a transcontinental proceeding (as in case of the TWA award). Eastern inferred, from the dicta in the 1956 *Eastern* case, that *"Ashbacker" would* be applicable where there was a *limited* expansion outside the "area" of the case since no major expansion of the area would be involved. But in the decision of the Court below

(on the Delta award), some three years later, Eastern discovered that "*Ashbacker*" apparently would *not* apply where only a small segment outside the area was involved (see B21), but would apply when an area case would become a transcontinental case. Thus litigants in air route proceedings are faced with total frustration—the Board can refuse to consolidate a transcontinental application into an area proceeding relying on the 1956 *Eastern* case dicta, and refuse to consolidate an application for a short extension outside the area on authority of the 1959 decision below. Therefore, "*Ashbacker*" would be emasculated by the two decisions (see, also, EAL 22-23).

II.

Reply to answers regarding elements of public convenience and necessity.

Although the Board (CAB 11-14) and Delta (DAL 23-24) assert that findings were made on the basic elements of public convenience and necessity to support the awards to Delta and TWA, it is apparent from those contentions that it is in the public interest for this Court to consider the requirements for valid findings of public convenience and necessity.

The Court below upheld the *conclusion* of the Board made without factual findings, that the routes awarded to TWA and Delta were required by the public convenience and necessity. The language of the Court below is irreconcilable with that of a statutory three-judge District Court in *Clarke* v. *United States*, 101 F. Supp. 587 (D. D. C. 1951), where the Court said:

> "The Commission is the final arbiter of the public interest and the function of a reviewing court is limi-

ted. At the same time, as the Supreme Court said in Interstate Commerce Commission *v.* Parker, the ultimate finding of public convenience and necessity must be based upon the proper statutory criteria and must have had the necessary factual findings to support it. . . . As the Supreme Court has said many times, we cannot exercise even our limited power of review unless the findings of fact are adequate to indicate that the Commission did consider these criteria which the law requires.

"In the record before us there are repeated references which indicate that there is not enough traffic over the routes here involved to *maintain efficiently* two carriers. *But the Commission made no finding one way or the other on that point. . . .*" (101 F. Supp. at 593-94, emphasis supplied).

Elsewhere in *Clarke* v. *United States, supra,* the Court said,

"discussion of the controversy should proceed from certain basic principles of public utility regulatory law. The first such principle is that, if there be traffic enough for only one carrier, only one carrier will be certificated. The public interest in that situation is for service. Only if there be *traffic enough to support efficient operations by more than one carrier does the public interest require the competitive operations of two carriers.*" (101 F. Supp. at 590, emphasis supplied.)

Eastern does not, as the Board asserts (CAB 12) allege that "precise dollar and cents forecasts" must be made by the Board to determine whether or not competition is economically feasible. Eastern maintains only that there must be *some* evaluation of revenues and traffic against expenses and capacity (based upon reliable and probative evidence) with lawful findings on the matter of whether

two (or more) carriers can be supported. The Board alleges that it was "found" in the proceedings before the Board that "the record amply demonstrates that the operations of a second carrier can be economically supported without adverse effect on existing carriers" (CAB 12). But nowhere are there any findings of fact to support that ultimate conclusion. The Board might equally well have said the record amply demonstrated that the operations of a second carrier *cannot* be economically supported, and there would be absolutely no method available to test that bald conclusion. Whether or not the record actually demonstrates what the Board in the proceedings before it said it demonstrates could be determined only if the Board actually made findings of essential basic facts. A mere recitation of what the parties alleged is insufficient; that is merely summation of the evidence. Basic findings on essential issues of *fact* are necessary and were not made.[1]

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[1] The Board asserts (CAB 12, 12 n. 8) that the Board took into account the estimates submitted by the parties in the proceeding, and that the Board "found" that the operations of a second carrier could be economically supported between St. Louis and the Southeast. The Board does not say where the parties' estimates were taken into account by the Board and, so far as Eastern can determine, the only instances that may be found are in the Examiner's *recitation of the evidence submitted by the parties* (see J. A. 325-67, headed "Proposals of the Applicants"). While the Board asserts that the Examiner "generally accepted" Delta's traffic estimates, it is important to note that the Examiner recommended *National* and not TWA for the route in question (J. A. 396) and, moreover, he noted that Delta's estimate was optimistic and, finally, he was considering only possible diversion from Eastern and not any balancing of revenues and traffic against expenses and capacity offered to determine whether the public convenience and necessity required another carrier (J. A. 381). There is absolutely no justification for the Board's contention (CAB 13, n. 8) that the "various cost and revenue estimates of the applicant, including those of TWA (J. A. 351-357), . . . obviously were accepted as being within the zone of reasonableness." The Examiner made no such findings nor gave any indication that he agreed or disagreed with the TWA forecasts. A comparison of Delta's revenue and expense estimates (J. A. 334) with TWA's estimates (J. A. 353) reflects great divergence of

III.

Reply to answers regarding the press release procedure.

The thrust of Delta's (DAL 24-25) and the Board's (CAB 14-15) arguments is that the press release is not the "final decision" of the Board.[1] In support of that contention, each party points to only one case, the *Seven States Area Investigation*, CAB Docket 7454 *et al.*, Order E-13254 (Dec. 8, 1958), of all the major Board proceedings that have been decided by press release (41 as of May, 1959, see EAL 26) since the procedure was instituted in August, 1956 to prevent "leaks" by untrustworthy persons participating in the decisional process. It is significant to note that not only is the *Seven States Case* hardly more than two percent of the cases that have been so decided,[2] but that the disparity between the decision of the Board in *Seven States* as announced by press release and the decision promulgated in the formalized opinion (CAB Order E-13254, Dec. 8, 1958) is actually insignificant and involved less than two percent of the route mileage awarded in that

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approaches. Delta's forecast revenues and expenses were more than twice as great as those predicted by TWA, and Delta's operating income was some 2½ times the profit forecast by TWA. While the Board correctly states that with respect to the route Delta was ultimately awarded there were certain costs and traffic estimates submitted by that carrier, *nowhere* did either the Examiner or the Board make any findings as to the validity or reliability of those estimates.

[1] Delta says (DAL 25) there is no conflict between the decision of the Court below and the views of the Second Circuit in *Eastern*; to the extent the Court below might have approved the practice *sub silentio*, its views conflict with the disapproval voiced by the Second Circuit (see EAL 29-30).

[2] Actually less than two percent, inasmuch as additional cases have been decided by press release since May of 1959.

case. The *Seven States Case* resulted in a general realignment of the local service air traffic pattern in the Great Plains region of the United States and the change between press release decision and formalized decision involved only minor and almost inconsequential segments.

The very slenderness of the reed on which Delta and the Board lean serves to emphasize that, for *all* practical purposes, the "press release" *is* the decision.

IV.

Reply to Miscellaneous Matters.

American asserts (AAL 18-19) that the decision below rests upon an independent unchallenged ground, namely that the Board's award to TWA would duplicate an existing license (*i.e.*, transcontinental interchange authorizations) without any proper finding of public convenience and necessity to support the duplicating license. Eastern expresses no opinion on the validity of this claim. However, if American is right, then the Delta award should be reversed as well, since Delta was authorized to duplicate an existing one-stop Kansas City-Atlanta service (the interchange service long operated by Eastern and Braniff by way of one stop at St. Louis) without any findings having been made by the Board that the public convenience and necessity required such duplication. Another internal inconsistency in the decision below is thus exposed.

Eastern does not take issue with National's exposition of the law as contained in *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 453 (1951), rather, Eastern's petition meets all the criteria of that case. No one has ever suggested that the problems presented by Eastern's petition are anything less than of the utmost

importance to the public as distinguished from the parties to the case. Indeed, it has come to Eastern's attention since filing its petition for certiorari that both the Board's "press release" procedure and the adequacy of the Board's findings upon the basic elements of the public convenience and necessity have recently been called into question in the District of Columbia Circuit. *United Air Lines, Inc. et al. v. Civil Aeronautics Board, et al.*, No. 15414 *et al.* D. C. Cir. 1960 (see, *e.g.*, Petitioner United's Brief, pp. i [on the press release question], and ii, 32-39 [on the inadequacy of findings question]). It thus appears that increasing litigation will arise charging those errors unless this Court defines the law.

It has already been demonstrated that confusion and conflict exist between the circuits on the application of *Ashbacker*, and the Board has found itself in such a quandary about what to do about *Ashbacker* situations[1] that on March 25, 1960, it asked Congress to enact legislation "to clarify the powers of the Civil Aeronautics Board in respect

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[1] American has asserted (AAL 12, n. 12) that the Board applies *Ashbacker* to proceedings before it, and cites in support of that contention the Board's decision in the *Southeastern Area Local Service Case*, Docket 7038 *et al.*, Order E-14754 (Dec. 18, 1959). That order is an excellent example of the confusion of the Board in approaching *Ashbacker*. True enough, the Board did make certain findings on one "*Ashbacker*" situation that was there presented, but it refused to make timely requested findings of fact on an *Ashbacker* situation presented by Eastern, which had sought consolidated hearing and decision in that proceeding on an application (Docket 8529) seeking a route identical to a route that was awarded another carrier. Eastern repeatedly sought contemporaneous consideration of its application, and asked for proper factual findings on the mutual exclusivity issue, but the Board emphasized in the order cited by American its refusal to make such findings (see, *e.g.* CAB Order E-14754, p. 59, n. 77). The order referred to by American simply corroborates the fact that the Board sometimes applies *Ashbacker* and sometimes does not. (Eastern has sought reconsideration of that order, pointing out that the Board's own findings show mutual exclusivity but the Board has not yet issued its order upon reconsideration.)

of consolidation of certain proceedings" (Letter from Chairman Durfee of the Civil Aeronautics Board to Richard M. Nixon, President of the Senate, March 25, 1960). The "Statement of Purpose and Need for Proposed Legislation" accompanying the draft bill includes the following language:

> "One of the most persistent problems the Board has encountered, particularly in large area route proceedings, has been the contention of applicants at the consolidation stage, based on the doctrine of *Ashbacker Radio Corp.* v. *F. C. C.* (326 U. S. 327 (1945)), that they are entitled as a matter of legal right to consolidation of particular applications. . . . In many instances in the past, a refusal by the Board to consolidate has resulted in an appeal to the courts from the consolidation order, with a request that the court stay further procedural steps in the Board proceeding pending disposition of the petition for review. . . .
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> "It is believed that legislation is needed which will (1) recognize the Board's right, in its sound discretion, to hear particular applications individually or in conjunction with others, . . . and (4) provide that the burden of establishing that applications should be consolidated for hearing or given contemporaneous consideration shall be on the person making request therefor" (*Congressional Record* 6872, Apr. 6, 1960).

Thus it would appear that the Board recognizes that the law now requires it to grant consolidated hearing on applications that are alleged to be mutually exclusive of applications the Board proposes to hear in a pending proceeding, and also that the burden of establishing mutual exclusivity is *not* on the person asserting mutual exclusivity, but upon

the person prosecuting an application and alleging that no mutual exclusivity exists. However, the Board in the case below, and in its pleadings in this Court, is asserting the contrary; if the Board felt the matter were free from doubt and in favor of its position in this case in this Court, obviously it would not feel any need for the legislation that it has requested less than two weeks ago.

Conclusion.

WHEREFORE, Eastern respectfully prays that the Answers of the other parties hereto be denied and that a writ of certiorari issue.

Respectfully submitted,

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